IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSE NUNEZ,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
JOHN THOMAS, et al.	:	NO. 08-1164
Respondents.	:	

REPORT AND RECOMMENDATION

LINDA K. CARACAPPA
UNITED STATES MAGISTRATE JUDGE

Now pending before this court is a petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, by a petitioner currently incarcerated in the State Correctional Institution at Chester, in Chester, Pennsylvania. For the reasons which follow, it is recommended that the petition be DENIED and DISMISSED.

I. PROCEDURAL HISTORY

On April 19 , 1999, following a bench trial before the Honorable Robert A. Latrone, petitioner was convicted of third-degree murder, recklessly endangering another person, and possessing an instrument of crime. Specifically, petitioner was found guilty of fatally shooting William Impagliazzo. Petitioner was sentenced to an aggregate term of ten (10) to twenty (20) years imprisonment.

Petitioner filed a direct appeal to the Superior Court, which affirmed petitioner's judgment of sentence on November 9, 2000. On May 14, 2001, the Pennsylvania Supreme Court denied petitioner's petition for allowance of appeal.

On March 5, 2002, petitioner filed a petition under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541, et seq. The court appointed counsel, who then filed a no merit letter in compliance with Commonwealth v. Finley, 550 A.2d 213 (Pa.Super. 1998). Petitioner filed an appeal to the Superior Court. The Superior Court remanded and instructed the PCRA court to reject the "no merit letter" and ordered a more detailed discussion on the merits of the issues. The PCRA court appointed new counsel. Counsel filed an amended petition. The PCRA court, after further review, denied relief. On September 8, 2006, the Superior Court of Pennsylvania affirmed the PCRA court's denial of post conviction relief. The Supreme Court of Pennsylvania denied petitioner's request for allocatur on March 7, 2007.

On March 7, 2008, petitioner filed the instant petition seeking habeas corpus relief. Respondents assert that this petition is time-barred, and must be dismissed, as petitioner is not entitled to habeas review or relief. We agree.

II. TIMELINESS

Petitioner's allegations of substantive grounds for relief need not be examined, as these claims are barred by the procedural obstacle of timeliness. A strict one-year time limitation on the filing of new petitions is set forth in the federal habeas statute, 28 U.S.C. § 2241, et seq., which was amended under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), enacted on April 24, 1996. Under section 2244(d), the AEDPA provides:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period shall run from the latest of-
>
> (A) the date on which the judgment became final by the conclusion of

> direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by the state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. §2244 (d)(1) (1996).

This statute also creates a tolling exception which notes that "[t]he time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2254(d)(2). A "properly filed application" is "one submitted according to the state's procedural requirements, such as the rules governing the time and place of filing." Lovasz v. Vaughn, 134 F.3d 146, 148 (3d Cir. 1998). If a petitioner files an out of time application and the state court dismisses it as time-barred, then it is not deemed to be a "properly filed application" for tolling purposes. Merritt v. Blaine, 326 F.3d 157, 165-66 (3d Cir. 2003).

In the case at bar, petitioner was sentenced on April 19, 1999. The Pennsylvania Supreme Court denied petitioner's petition for allowance of appeal on May 14, 2001. Petitioner then had ninety days to file an appeal to the Supreme Court of the United States. Petitioner never appealed to the Supreme Court of the United States. Accordingly, direct review ceased on August 13, 2001. Thus, petitioner had until August 13, 2002 in order to file a timely petition for

Writ of Habeas Corpus. Petitioner filed a PCRA petition on March 5, 2002. The statute of limitations was then tolled, after approximately seven (7) months of petitioner's one year time limit had passed. The PCRA court dismissed the petition on July 6, 2005. The Superior Court affirmed the PCRA court's dismissal on September 8, 2006. On March 7, 2007, the Supreme Court of Pennsylvania denied the petition for allowance of appeal. The AEDPA statute of limitations started to run again on March 7, 2007, the date the Pennsylvania Supreme Court denied petitioner's petition for allowance of appeal. Petitioner then had just over five (5) months left to file a petition for Writ of Habeas Corpus. The instant habeas petition was not filed until March 7, 2008, approximately seven (7) months after the deadline for filing deadline for filing, leaving this court with no choice but to dismiss the request for relief as untimely without consideration on the merits.

One avenue of relief remains for petitioner. The statute of limitations set forth in the AEDPA is subject to equitable tolling. Miller v. New Jersey State Dept. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998). Equitable tolling is proper only when the "principles of equity would make [the] rigid application [of a limitation period] unfair." Id. (full quotation omitted). The Third Circuit has set forth three circumstances permitting equitable tolling: (1) if the defendant has actively misled the plaintiff; (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) if the plaintiff has timely asserted his rights, but has mistakenly done so in the wrong forum. Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999) (internal quotations omitted). "In non-capital cases, attorney error, miscalculation, inadequate research or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling." Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001), cert. denied, 122

S. Ct. 323 (2001) (citing cases). Petitioner has failed to argue that any valid circumstances exist to equitably toll the statute of limitations, and thus the habeas petition must be dismissed in its entirety.

Therefore, I make the following:

RECOMMENDATION

AND NOW, this _______ day of August, 2008, IT IS RESPECTFULLY RECOMMENDED that the petition for Writ of Habeas Corpus be DENIED AND DISMISSED. It is also RECOMMENDED that a certificate of appealability not be granted.

The petitioner may file objections to this Report and Recommendation. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/S LINDA K. CARACAPPA
LINDA K. CARACAPPA
UNITED STATES MAGISTRATE JUDGE